

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7746

Petition of Vermont Telephone Company, Inc., for a)
certificate of public good to own and operate a cable)
television system in the Company's existing service areas)
within the municipalities of Andover, Athens, Bridgewater,)
Chester, Clarendon, Danby, Dorset, Grafton, Hartland, Ira,)
Killington, Middletown Springs, Mount Holly, Mount)
Tabor, Pawlet, Plymouth, Reading, Rockingham, Rupert,)
Shrewsbury, Springfield, Tinmouth, Wallingford,)
Weathersfield, Wells, West Windsor, Westminster,)
Windham and Woodstock, Vermont)

Order entered: 8/10/2011

PREHEARING CONFERENCE MEMORANDUM AND ORDER RE: INTERVENTION

This case concerns a petition filed on June 30, 2011, by Vermont Telephone Company, Inc. ("VTel" or the "Company") requesting a certificate of public good ("CPG") pursuant to 30 V.S.A. §§ 503 and 504 to own and operate a cable television system within its existing telephone service area, which includes some areas that are — and some areas that are not — presently served by another cable television provider.¹ The Company is required to obtain a CPG from the Vermont Public Service Board ("Board") to provide cable service to its existing customers as a condition precedent for a disbursement from the United States Department of Agriculture's Rural Utility Service ("RUS") of a \$116 Million grant (the "RUS Funds"). The RUS Funds will enable VTel to build the Wireless Open World Project (the "WOW Project") —

1. VTel is also seeking an order approving a settlement it has reached with the Vermont Department of Public Service (the "Department") in connection with the petition under review in this proceeding.

an undertaking that would, among other things, significantly expand the availability of wireless broadband coverage in Vermont, in particular to unserved areas.²

In this Order, I grant permissive intervenor status on a conditional basis to the New England Cable & Telecommunications Associations, Inc. ("NECTA") and Vermont Access Network ("VAN"). I also set a procedural schedule for this docket.

On July 27, 2011, I convened a prehearing conference in this case. Notices of appearance were entered by the following individuals: Peter Zamore, Esq., Sheehey Furlong & Behm P.C., on behalf of VTel; Megan Ludwig, Esq., on behalf of the Department; and Andrew Raubvogel, Esq., Dunkiel Saunders Elliott Raubvogel & Hand, PLLC, on behalf of NECTA. Also present was Mr. Greg EplerWood, *pro se*, on behalf of VAN.³

At the prehearing conference, VTel proposed a procedural schedule that contemplates an expedited review of its petition for a CPG. With support from the Department, the Company explained that before the RUS will disburse the RUS Funds to VTel, the Company must secure a CPG from the Board and complete an involved "grant closing" process with the RUS that entails obtaining "sign off" from the agency that VTel has complied with numerous grant conditions. The Company took care to emphasize that while the RUS has set no fixed deadline for commencing construction of the WOW Project, construction must be well under way by the end of the 2011 Fall construction season — and substantially complete in 2012 — in order to achieve the State of Vermont's broadband deployment goals by the end of 2013. While VTel could begin construction on a limited basis without access to the RUS Funds, the WOW Project cannot be completed without this funding. In turn, the more VTel relies on its own resources to launch construction of the WOW Project, the greater the risk becomes that the RUS may view the

2. The CPG VTel is seeking in this docket and the RUS Funds are also necessary for the Company's fiber-to-the-home project and its recently-announced Smart Grid arrangements with Vermont's two largest electric utilities, Central Vermont Public Service Corporation and Green Mountain Power Corporation.

3. At the time of the prehearing conference, neither NECTA nor VAN was a formal party to this proceeding; the representatives for both of these entities — Attorney Raubvogel and Mr. Eplerwood, respectively — indicated at the prehearing conference that they expected to file for intervenor status. Therefore, for the sake of administrative efficiency, I permitted Attorney Raubvogel and Mr. EplerWood to address various procedural matters that were discussed at the prehearing conference, with the understanding that their participation did not signify that they had been granted party status in this docket.

WOW Project as a lower funding priority and would therefore turn its attention to processing other applications for final disbursement. In other words, "everyone is pushing the RUS to process their application first" in a context where "grants, even though they [have] been committed, . . . if they are not progressing on a good level, . . . there is some fear that the money will not be available or will be reallocated. . . ."4

Also at the prehearing conference, NECTA and VAN expressed their desire to intervene in this docket. VTel and the Department stated that they would not oppose intervention by NECTA or VAN. In turn, I set a deadline of August 8, 2011, for NECTA and VAN to submit intervention motions in order to explain more fully their grounds for seeking intervenor status.

Intervention

Both NECTA and VAN filed timely intervention motions in this case on August 8, 2011. In proceedings before the Board, intervention motions are governed by Board Rule 2.209, which provides as follows:

(A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

(B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

Intervenor participation in Board proceedings may also be conditioned pursuant to Board Rule 2.209(C), which states:

4. Docket 7746, tr. 7/27/11 at 17 (Zamore) and 22 (Porter).

Conditions. Where a party has been granted intervention, the Board may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

The VAN Motion

VAN is an association that represents the interests of Access Management Organizations ("AMOs") with Public, Educational, and Governmental ("PEG") service territories in Vermont. Several AMO members of VAN have in their PEG service territory at least one municipality for which VTel is seeking a CPG to provide cable television service.

VAN is seeking intervention "as of right" and on a permissive basis. Under Board Rule 209(A), VAN must demonstrate that its substantial interests may be "adversely" affected by the outcome of this proceeding in order to support a request to intervene "as of right." The VAN Motion makes no such showing. To the contrary, VAN has "sent a letter of support to VTel" concerning the Company's petition, and has "encouraged each AMO affected by this Docket to do the same." VAN Motion at 2. Therefore, I conclude that VAN has not demonstrated that its substantial interest may be adversely affected by this docket. Accordingly, I deny VAN intervenor status "as of right."

I consider next whether the VAN Motion satisfies the "permissive" intervention standard of Board Rule 209(B). Because VTel is a new entrant into the cable television business, VAN contends that it has a substantial interest in participating in this proceeding to ensure that VTel's CPG conditions for providing and supporting PEG access in its service territory reflect the "best practices in the field."⁵ The VAN Motion further asserts that there is no other party in this proceeding that will protect its interest because the Department and VTel have negotiated a settlement in this docket that contains PEG access conditions without any input from VAN or its affected members.⁶

5. Motion to Intervene filed by VAN, dated August 5, 2011 at 1 (the "VAN Motion").

6. *Id.* at 1. The VAN Motion did not address the remaining permissive intervention criteria of the availability of adequate alternatives for protecting its interest and whether its intervention will result in undue delay or prejudice to the parties.

I agree that VAN represents a membership that has a substantial interest in the outcome of this proceeding — the substantial nature of this interest is reflected in the detailed requirements of Public Service Board Rule 8.400, which establishes the Board's framework for regulating the provisioning of cable-based PEG service in Vermont. Moreover, I am persuaded that, in this case, neither the Department nor VTel may be expected to represent VAN's interest in securing any CPG conditions relating to PEG service that may differ from those contained in the settlement between the Department and VTel. While it is not clear to me that this docket represents the exclusive means for VAN to protect its substantial interest in securing favorable PEG access conditions in VTel's proposed cable service territory, the interests of judicial economy and administrative efficiency militate in favor of addressing VAN's concerns in this proceeding, provided that this will not result in undue delay or prejudice to VTel. Because VAN has expressed its support for VTel's request for an expedited review of its CPG petition, I conclude that VAN's participation in this docket will not result in undue delay, and thus will not prejudice VTel.⁷ I therefore grant VAN intervenor status in this Docket on a permissive basis.

Pursuant to Board Rule 209(C), I hereby impose the following conditions upon VAN's intervention in this proceeding. First, VAN must participate subject to the procedural schedule I have set forth below in this Order. Second, VAN's participation shall be limited to the issue of the adequacy of the PEG service conditions in VTel's proposed CPG.

The NECTA Motion

NECTA is seeking to intervene on a permissive basis.⁸ NECTA is a trade association that represents the cable industry in New England. NECTA represents that its members have a substantial interest in ensuring that VTel's CPG conditions "are competitively neutral and in full accord with applicable legal requirements."⁹ NECTA contends that VTel's petition contains "problematic provisions" that raise the following "level playing field" concerns: (1) a lack of

7. *Letter from Rob Chapman, on behalf of VAN, to Susan M. Hudson, Clerk of the Board*, dated August 4, 2011, at 1.

8. NECTA Motion to Intervene dated August 8, 2011, at 1 (the "NECTA Motion").

9. NECTA Motion at 1.

definitive conditions regarding the provision of PEG access; (2) the calculation of PEG access funding; (3) the requirements concerning line extensions and the reporting thereof; (4) the requirements concerning customer service and subscriber notice.¹⁰ NECTA argues that its interests will not be adequately protected by the Department, whose statutory charge is to represent "the interests of the people of the state" — a broader set of interests compared to the more narrowly drawn concerns of NECTA's membership.¹¹ As in the case of VAN, NECTA maintains that the Department is unlikely to pursue NECTA's interests, given that the settlement with VTel supports a CPG containing terms concerning which NECTA "continues to have reservations."¹² NECTA asserts that there are no alternative means for protecting its interest in ensuring competitive neutrality because there is no other forum besides the Board where "NECTA or its members can turn to ensure that any CPG the Board grants protects the interests of all cable competitors through a level playing field."¹³ Finally, NECTA argues that its intervention will not cause undue delay or prejudice because it has proposed a schedule that "will allow the Board to consider all aspects, as well as the competitive impacts of a proposed CPG" and is only "slightly longer" than the schedule proposed by VTel.¹⁴

On August 9, 2011, VTel filed a letter reiterating that it does not oppose NECTA's intervention, but commenting that NECTA's intervention should be limited to the specific issues identified in the NECTA Motion.¹⁵

I am persuaded that NECTA has a substantial interest in ensuring the competitive neutrality of the terms of any CPG the Board may award to VTel. However, I am troubled by the unspecific nature of the term "competitive neutrality." That said, I recognize that the four

10. NECTA Motion at 2.

11. NECTA Motion at 3.

12. NECTA Motion at 3.

13. NECTA Motion at 4.

14. NECTA Motion at 4-5.

15. *Letter from Peter Zamore, Esq., on behalf of VTel, to Susan M. Hudson, Clerk of the Board*, dated August 9, 2011, at 1.

competitive neutrality issues enumerated in the NECTA Motion are appropriate matters for consideration in the review of a cable CPG petition — these issues are familiar to the Board from prior proceedings.¹⁶ Accordingly, I would expect that they would not occasion extensive or protracted litigation by NECTA as a permissive intervenor.

I agree with NECTA that the settlement between VTel and the Department suggests that, in this case, the Department is unlikely to negotiate for CPG conditions that NECTA deems warranted concerning competitive neutrality. It is less clear to me, though, that the NECTA Motion demonstrates that there are no alternative means available to NECTA beyond intervening in this proceeding for it to pursue its competitive neutrality concerns. NECTA correctly points out that it must turn to this Board as the forum for addressing level playing field issues in Vermont's cable sector, but that does not mean this Board proceeding is the only procedural venue for seeking establishment or review in this forum of policies designed to foster competitive neutrality in Vermont's cable sector.¹⁷ That said, as in the case of VAN, the interests of judicial economy and administrative efficiency suggest that it would be appropriate to permit NECTA to explore the competitive neutrality concerns it has identified in its intervention motion, provided it can do so without causing undue delay in this docket or prejudice to the other parties.

NECTA represents that it does not oppose the VTel petition.¹⁸ Consistent with this representation, NECTA has filed a proposed schedule featuring what it considers to be "unprecedented brevity to accommodate VTel's interest in securing funding for the WOW project as soon as possible"¹⁹ I observe that NECTA's most recent scheduling proposal reflects a

16. See, e.g., Docket 7044, *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont*, Order of 9/13/05; Docket 7461, *Petition of ValleyNet, Inc. for a Certificate of Public Good to own and operate a cable television system in the State of Vermont*, Order of 1/22/10.

17. For instance, NECTA's Vermont members could petition the Department or the Board to inquire into these concerns in a workshop, an investigation, or a rulemaking proceeding.

18. *NECTA's Comments on the Schedule for This Proceeding*, dated August 8, 2011, at 1. This document was attached to the NECTA Motion.

19. NECTA Motion at 4.

proposed final Board order date of October 28, 2011, which is three and a half months sooner than NECTA's original proposed final order date of February 17, 2012. Therefore, it would appear from the changes evident in NECTA's second proposed schedule that NECTA recognizes the time-sensitive nature of this proceeding and is prepared to act in good faith to facilitate the issuance of a timely final order.²⁰ Thus, on balance, and subject to the conditions discussed below, I conclude that NECTA's intervention will not cause undue delay in this Docket or prejudice to the parties. Accordingly, it is appropriate to grant NECTA intervenor status on a permissive basis.

As in the case of VAN, I find it is appropriate to condition NECTA's participation in this case pursuant to Board Rule 209(C). These conditions will ensure that NECTA receives a meaningful opportunity to protect its substantial interest in competitive neutrality without causing undue delay or prejudice to the other parties.

First, like VAN, NECTA must participate subject to the procedural schedule I have set forth below in this Order. Second, NECTA's intervention shall be limited to the issue of competitive neutrality, with emphasis on the four matters identified earlier in this Order.

I note that NECTA has attempted to reserve "the right to raise *any and all* issues that are relevant to its interests surrounding competitive neutrality."²¹ However, given that VTel filed its petition on June 30, 2011, and given that NECTA first notified the Board of its intent to seek to intervene in this proceeding on July 20, 2011 — but did not do so until 18 days later on August 8, 2011 — I do not agree that VTel "has not yet had a complete opportunity to analyze all of VTel's petition materials" ²² NECTA has represented that its intervention in this case will add the value of "expertise in the complex terms and conditions of bottleneck pole and conduit facilities and new cable ventures by incumbent local exchange carriers."²³ It is therefore reasonable to conclude that an expert such as NECTA has had sufficient time to review VTel's

20. In any event, it is incumbent upon an intervenor to take the proceeding as it finds it.

21. NECTA Motion at 2 (emphasis added).

22. NECTA Motion at 2 n. 1.

23. NECTA Motion at 6.

petition and supporting testimony to specifically identify in its intervention motion the issues and concerns that should be familiar and readily recognizable, given NECTA's expertise in competitive neutrality. For these reasons, while at this time I do not foreclose NECTA from raising additional material competitive neutrality issues that for good cause may not have been identified in its intervention motion, I caution NECTA against assuming that it is free to raise "any and all" remaining competitive neutrality issues. Rather, as a condition of permissive intervention in this Docket, NECTA must use its expertise efficiently to identify and raise only those material competitive neutrality issues that relate directly to the statutory criteria of 30 V.S.A. Chapter 13 or the so-called EMCO criteria outlined in Board Rule 8.214.

Procedural Schedule

With consent from the Department, VTel submitted a proposed procedural schedule during the prehearing conference that provided for accelerated review and disposition of the Company's petition. Since then, VTel has submitted a second proposed procedural schedule that provides for a final order to be issued by September 13, 2011, and that includes dates for a public hearing and a technical hearing.²⁴

In turn, in conjunction with filing its intervention motion, NECTA has most recently proposed a procedural schedule that provides for a final order to be issued by October 28, 2011, and that includes dates for a public hearing and a technical hearing.²⁵

I decline to adopt in the entirety any of the scheduling proposals I have received to date. Instead, I have considered the proposals of both parties in crafting the following schedule, which I now adopt:

August 8, 2011	Deadline for filing motions to intervene.
August 10, 2011	Rolling discovery begins by NECTA and VAN on VTel's prefiled testimony with a 5 calendar-day response time. Discovery requests and responses may be served by the parties via electronic mail or hand delivery. Both electronic mail copies and hard copies of discovery shall

24. *Letter from Peter Zamore, Esq., on behalf of VTel, to Susan M. Hudson, Clerk of the Board*, dated August 4, 2011. The Department supports Vtel's second proposed schedule as well.

25. *NECTA's Comments on the Schedule for This Proceeding*, dated August 8, 2011, at 1. This document was attached to the NECTA Motion.

be filed with the Board as well, the hard copies to be delivered to the Board on the day following service by electronic mail.

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| August 22, 2011 | Public hearing <i>via</i> Vermont Interactive Television Network. |
| August 25, 2011 | Parties file a regulatory settlement and a proposed order and CPG that reflect the terms of the settlement and contains specific supporting citations to the evidentiary record. In the event that either NECTA or VAN does not join in filing a regulatory settlement is filed, NECTA and VAN may respectively file direct testimony that shall be limited in scope as provided by their respective conditions for intervention as set forth in this Order. |
| August 29, 2011 | Technical Hearing. |
| September 6, 2011 | The Parties file direct briefs, proposed findings of fact, and proposed CPGs. The proposed findings of fact and the proposed CPG terms and conditions shall be supported by specific citations to the record evidence. |
| September 9, 2011 | The Parties file reply briefs. |

The foregoing schedule does not provide for the circulation of a proposal for decision. Instead, pursuant to 30 V.S.A. § 811, the Board will read the record and issue a final order based on that reading.

I have established that discovery shall be conducted on a rolling basis, and I have curtailed the proposed 7-day discovery turnaround time to 5 days, thereby affording NECTA the opportunity to pose initial and follow-up questions.²⁶ I have pushed the deadlines for filing direct testimony and the technical hearings out from the dates proposed by VTel in order to provide NECTA with more time to articulate its position and prepare for hearing.

I now turn briefly to NECTA's point that "VTel's admittedly unjustified delay in filing its petition, coupled with the time the Board ordinarily requires to consider a cable petition, is directly relevant to whether the Board should expect VTel to bear some of the burdens and risks

26. I also note that NECTA and VAN are free to depose VTel pursuant to V.R.C.P. 30.

resulting from of [sic] its actions"27 To be sure, it would have been desirable for VTel to have filed its petition in this case sooner. The Company has apologized at length on the record for misjudging the timing of its filing and the resulting scheduling pressures. VTel has waived all opportunity (1) to conduct discovery on any testimony NECTA may choose to file; and (2) to file any rebuttal testimony. I therefore conclude that VTel indeed will be shouldering some of the burden and risks in this proceeding that have resulted from its failure to file its cable CPG petition with the Board more promptly.

Finally, I would observe that while the Board's ability and consent to move with deliberate speed in this matter is not without precedent or justification, it should not be taken as an invitation to repeat the mistake of filing a petition later when it is possible to file for regulatory review sooner. Rather, the expedited review that VTel is being afforded in this case reflects the Board's desire to support the State's policy goal of achieving statewide broadband deployment by 2013 and to do what is possible, within reason, to ensure that Vermonters do not lose the opportunity to realize the benefit of the RUS Funds that are presently designated for disbursement to VTel.

SO ORDERED.

27. *Id.* at 2.

Dated at Montpelier, Vermont, this 10th day of August, 2011.

s/ June E. Tierney

June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: August 10, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)